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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. EDUARDO SOLIS DUQUE, Defendant and Appellant.	F074486 (Kern Super. Ct. No. RF007286A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Eric Bradshaw, Judge.

Robert Navarro, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Peter W. Thompson, Deputy Attorneys General, for Plaintiff and Respondent.

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BACKGROUND

An information filed on November 16, 2015, charged defendant Eduardo Solis Duque with one count of inflicting corporal injury on a person formerly in a dating relationship with the defendant (count 1; Pen. Code, § 273.5, subd. (a).)[1] The information also alleged that in the commission of the offense, he inflicted great bodily injury. (§ 12022.7, subd. (e).)

A jury convicted defendant and found the great bodily injury allegation true. The court sentenced defendant to seven years in prison (two years for the corporal injury conviction and five years for the great bodily injury enhancement.)

FACTS

Lori A.'s Testimony

Lori A. dated defendant for just over a year and a half until the end of April 2015. They lived together for over a year.

Lori is 5 feet 9 inches tall. Defendant is 5 feet 4 inches or 5 feet 5 inches tall, and Lori "guess[ed]" he weighed about 250 pounds at the time.

About a week before May 1, 2015, Lori told defendant she was "done" with the relationship. Defendant left many of his belongings at Lori's but took his "basics" and went to stay with his parents.

On the morning of May 1, defendant came to Lori's home at around 5:00 or 6:00 in the morning to retrieve his clothing and other items. Defendant propositioned Lori for sex, but she declined. Defendant "got huffy" and slammed the bathroom door. Lori heard defendant in the garage. It sounded like "things were breaking." Defendant came in from the garage with an empty laundry basket. He yelled at Lori asking, "[W]hy … [she] move[d] his f[**]king clothes." Lori told defendant she had moved his clothes, so they would not get dirty.

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[1] All future statutory references are to the Penal Code unless otherwise noted.

Defendant went into Lori's son's room and removed a PlayStation video game system. (Defendant would later testify that it was *his* son's PlayStation system.) Lori got up out of bed, went to the kitchen and asked defendant, " 'What do you think you're doing?' " Both Lori and defendant were angry and yelled at one another. Eventually, defendant stopped talking while looking out the kitchen window. Lori moved close to him so that their faces were about a foot apart. She told defendant, " 'Get your shit and get out.' " Defendant turned around and faced her. He looked so angry that Lori became scared. Lori took a step back. Defendant grabbed her "hard" by the "upper arms." Defendant moved her in a back-and-forth motion twice. Lori described this as defendant shoving her without letting go. Lori screamed, " 'No, don't do this, don't do this.' " Defendant then threw Lori, causing her feet to leave the ground. The right side of Lori's body, including her arm, impacted a nearby hutch. She immediately felt pain and heard a crunch sound. Lori fell to the ground and could not move her arm. She was crying and screaming, and she could not get up.

Defendant stepped over Lori and told her to shut up. Defendant asked if she wanted him to call an ambulance. Lori interpreted defendant's question as sarcastic.

Eventually, defendant brought Lori pain relievers, a heat pad, cigarettes, and her phone.

After lying on the floor for about two and a half hours, Lori told defendant her son would be home from school in about 30 minutes. Lori offered to say that she had tripped over a power cord. Defendant pulled out a kitchen mixer in order to "pull the cord out farther."

Defendant called an ambulance company directly.

Defendant's Testimony

Defendant testified that that he and Lori had been arguing "on and off" throughout the week prior to May 1. However, it was not until the events of May 1 that he was "for sure" moving out.

At 2:00 a.m., on May 1, Lori sent defendant a text message saying she could not sleep and asked defendant to come by before work. Because defendant and Lori "typically … have intercourse" before he went to work, he understood Lori's message to be referencing sex.

At around 6:00 a.m., defendant used his keys to enter Lori's home. He did some laundry, took a shower, and walked into the master bedroom. Lori was on the bed, smoking a cigarette. They began arguing about Lori not wanting to have sex. However, the "main" argument centered around defendant smelling marijuana in the house. This bothered defendant because his children lived in the house. Defendant said he would call the police chief, though he really had no intention of doing so. Defendant went to Lori's son's room and saw a bong on the floor. Defendant decided he was going to move out and grabbed his hamper of clothes, and his son's PlayStation that he had purchased.

Defendant then went into the kitchen and began making his lunch. Lori came out of the bedroom and told defendant that if he called the police chief, " 'you and your family are f[**]ked.' " She also said defendant would regret calling the police chief. Defendant sat looking out the window without talking for a couple minutes. Lori tried to make eye contact with defendant to get him to talk, but he would not. This made Lori angry. Lori grabbed him by the shirt, spun him around, and said, " 'Look in my face, motherf[***]er, I'm not joking around.' " She poked him in the chest and said, " 'Hey, you go ahead do it and look what's going to happen.' " Defendant said, " 'Get away from me,' " and pushed her.[2] Lori "went back and hit the lower part" of a nearby hutch. She screamed in pain. Defendant told Lori he was sorry. They agreed she would say she fell.

[2] Detective Thomas Dilley testified that the responding paramedic told him Lori had said, " 'I was instigating it and he just pushed me away.' "

Paramedic's Testimony

The paramedic who responded to the scene testified that Lori was on the floor, in pain. The paramedic recalled seeing a cord that was "stretched out" and ran to a wall. Defendant told the paramedic that he was not home at the time, but that Lori had told him she tripped over a cord. Lori also told the paramedic she had tripped over a cord.

Later, when the paramedic was transporting Lori from Ridgecrest Regional to Kern Medical Center, Lori said she did not want to talk to defendant on the phone because he was the reason she was there.

Dr. Arturo Gomez's Testimony

Orthopedic surgeon, Dr. Arturo Gomez, treated Lori for a right proximal humerus fracture (i.e., a fracture around the shoulder), and a right intertrochanteric femur fracture (i.e., a fracture of long thigh bone near hip). Both fractures required surgery to properly repair. Recovery for Lori's shoulder-area fracture would generally be six to eight weeks; and recovery for her femur fracture would generally be two to three months.

Dr. Gomez testified that Lori's bones look normal for her age. It would require "substantial force" to cause the type of femur fracture she suffered. Dr. Gomez has never seen that type of femur fracture caused by falling from a standing position.

Dr. Gomez acknowledged that in X-ray reports, two different radiologists found osteopenia. Osteopenia refers to diminished bone density.

Dr. Gomez also testified he was aware Lori had previously undergone gastric bypass surgery. He was also aware that patients who have had gastric bypass surgery have a higher incidence of fractures.

DISCUSSION

I. Issues Concerning Defense Counsel's Closing Summation

Defendant argues his trial counsel was ineffective in how he presented closing argument.

Law of Ineffective Assistance of Counsel

" ' "To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. [Citation.]" ' " (*People v. Rices* (2017) 4 Cal.5th 49, 80.)

A. Osteopenia Issue

Pretrial, defense counsel informed the court he "planned on getting into" the fact that Lori has low bone density. Later, counsel explained the prosecution would likely dispute defendant's claim that he simply "pushed" Lori, by arguing a push would not cause a femur fracture. To rebut the prosecution's anticipated argument, defense counsel would point to Lori's purported osteopenia. The court clarified with defense counsel that he was not citing osteopenia as a supervening cause that exculpates defendant. Defense counsel acknowledged he "can't make that argument" because "the law on that's real bad."

In closing summation, defense counsel argued to the jury that a "push" causing "broken bones [is] not likely to happen if nothing unusual intervenes. [¶] Now, what could have intervened? Now, [the prosecutor] said there was no evidence at all presented by … Dr. Gomez that she had the bones of a healthy person [*sic*]. Well, somebody in that office, somebody at KMC thought she suffered from osteopenia."[3]

Defendant contends that these statements and others by counsel during closing improperly posited that Lori's low bone density was an intervening cause of her injuries.

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[3] After closing arguments, the jury sent a question to the court: "Is willfully committing the act equivalent to willfully committing a physical injury?" The court responded, "For purposes of CALCRIM 840, willfully committing the act is equivalent to willfully inflicting a physical injury." Defense counsel agreed with the court's response.

Such an argument, defendant contends, is contrary to the law because a "defendant is liable for a crime *irrespective* of other concurrent causes contributing to the harm [citation], and particularly when the contributing factor was a preexisting condition of the victim." (*People v. Wattier* (1996) 51 Cal.App.4th 948, 953, original italics.)

We assume, without deciding, that defense counsel's comments do incorrectly suggest that Lori's purported osteopenia is an intervening cause of her injuries. However, even accepting defendant's characterization of counsel's argument, defendant cannot show prejudice. At most, defense counsel was stretching the concept of intervening cause to *help* defendant. If the jury accepted counsel's arguably misleading assertions, it would have benefitted defendant. Defendant cannot establish prejudice because he cannot show " ' "there is a reasonable probability that, but for counsel's failings, the result would have been *more favorable* to the defendant. [Citation.]" ' " (*People v. Rices*, *supra*, 4 Cal.5th at p. 80, italics added).

B. Self-Defense Issue

Next, defendant argues his counsel "abandoned" a plausible theory of self-defense by failing to mention it during closing argument. Defendant concedes his counsel did argue self-defense in the opening statement. However, he complains that counsel did not "remind[]" the jury of self-defense in closing.[4]

Even assuming the failure to "remind" the jury of a defense theory in closing argument is equivalent to abandoning that defense, we reject defendant's claim.

"[C]ounsel does not render ineffective assistance by choosing one or several theories of defense over another. [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th

[4] The prosecutor argued in closing that if self-defense applied, defendant would have wanted to tell his side of the story to police. Yet, he called the ambulance company directly rather than 911. The prosecutor also argued that this case was not one of self-defense because the mixer cord was "staged."

926, 1007.) "Failure to argue an alternative theory is not objectively unreasonable as a matter of law." (*People v. Thomas* (1992) 2 Cal.4th 489, 531.)

When the record does not reveal whether counsel had a plausible tactical reason for his or her conduct, a claim of ineffective assistance fails. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1223.) Here, the record does not reveal whether counsel had a plausible tactical reason for not diligently pursuing the theory of self-defense in closing summation. Defense counsel could have reasonably concluded that defendant's testimony precluded self-defense and that, as a result, presenting such an argument would hurt his credibility with the jury. Defendant testified he "wanted to get her away from me" and pushed her. Defendant testified that he knew he had done something wrong by pushing Lori. He also said that pushing her was not a fair reaction to what Lori had been doing to him. Defense counsel could have reasonably concluded that self-defense was too weak a theory to argue to the jury.

II. Instructing the Jury with CALCRIM No. 3472 was not Prejudicial Error

The court instructed the jury with CALCRIM No. 3472, as follows:

> "A person does not have the right to self-defense if he or she provokes a fight or with the intent to create an excuse to use force."

Defendant argues the court should not have given the instruction because there was insufficient evidence he provoked a quarrel with Lori as an excuse to use force. We need not reach that contention, because the trial court also instructed the jury: "Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the faces as you find them." We assume the jury followed such an instruction and avoided any prejudice from giving an a potentially irrelevant instruction. (See *People v. Chism* (2014) 58 Cal.4th 1266, 1299; *People v. Holloway* (2004) 33 Cal.4th 96, 152–153.)

III. Defendant is Entitled to an Additional Day of Credit

The parties agree that defendant is entitled to an additional day of custody credit. We accept this concession.

DISPOSITION

The abstract of judgment shall be amended to reflect defendant is entitled to one additional day of custody credit. The trial court shall cause the amended abstract to be prepared and transmitted to all appropriate parties and entities.

In all other respects, the judgment is affirmed.

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POOCHIGIAN, J.

WE CONCUR:

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HILL, P.J.

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MEEHAN, J.